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Replies given on 22 March 1999 by the observer of the International Committee of the Red Cross to the questions asked by the delegations of Belgium and Mexico regarding the implications of article 2, paragraph 1 (b)

A. The role of international humanitarian law in the draft convention

1. The eighth preambular paragraph of the draft convention (A/AC.252/L.7) states:

> "*Considering* that any act governed by international humanitarian law is not governed by this Convention,".

2. In view of the importance of international humanitarian law in the scope of application of the draft convention (an importance underscored by the references that many delegations have made to international humanitarian law), the International Committee of the Red Cross (ICRC), like the delegation of Lebanon (A/AC.252/1999/WP.33), proposed that this paragraph should be removed from the preamble and inserted in the operative part of the Convention. This was, moreover, the practice in earlier instruments relating to the suppression of terrorist acts and would clearly demonstrate that international humanitarian law (the *lex specialis* in situations of armed conflict) is not modified by the convention, while unambiguously stating that the activities carried out by ICRC pursuant to the mandate entrusted to it by this law are not affected by the convention.

3. With regard to situations not covered by international humanitarian law, ICRC proposed in its statement of 19 March 1999 (see the annex to this document) that the convention should include a reference to the statutes of the International Red Cross and Red Crescent Movement.

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B. International humanitarian law and the question of terrorism

4. As ICRC explained in its statement to this Committee at its last session, on 6 October 1998 (see A/C.6/53/WG.1/INF/1), in situations of armed conflict, be they international or non-international, international humanitarian law has a clear answer to terrorism, in that it unconditionally prohibits terrorist acts and provides for their universal suppression insofar as they are grave breaches of the 1949 Geneva Conventions or of Protocol I.

C. The text of the article in question

5. The revised text of article 2, paragraph 1 (b), proposed by France on 22 March 1999 in document A/AC.252/1999/WP.45, reads as follows:

> "1. Any person commits an offence within the meaning of this Convention if that person [unlawfully and intentionally] provides financing with the knowledge or intent that such financing will be used, in full or in part, to commit [or to prepare the commission of]:
>
> ...
>
> (b) An act designed to cause death or serious bodily injury to a civilian or to any other person, other than in armed conflict (not underlined in the text), when such an act, by its nature or context, is designed to intimidate a Government or the civilian population."[1]

D. The implications of article 2, paragraph 1 (b):

6. The spirit of the text proposed by France in this case is to respect the nature and specific role of international humanitarian law in a situation of armed conflict as *lex specialis*, and thus to provide maximum protection to the civilian population at all times, while at the same time recognizing the special status of the combatants taking part in an armed conflict. One of the cardinal principles of international humanitarian law is to place all the parties to an armed conflict on an equal footing *vis-à-vis* their obligations under international humanitarian law.[2] It should also be noted that acts of war are, by their very nature, designed to "intimidate a Government" (article 2, paragraph 1 (b) of document A/AC.252/1999/WP.45).

7. Nevertheless, a problem remains, namely, what happens to individuals or groups not constituting or not belonging to a "party to the conflict", and therefore not subject to international humanitarian law as such? This question is particularly important in situations of armed conflict of a non-international nature, in other words, internal conflicts.

8. Let us take an example here to illustrate our meaning. In a country torn by an internal armed conflict to which international humanitarian law is applicable, an official is dismissed. He believes that his dismissal is unjust and decides to take revenge and force the Government to put an end to dismissals. He requests financial assistance from a clandestine organization based abroad. With this money, he acquires a bomb, which he explodes inside

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[1] This document is based on the French version of the article in question. We note that several delegations, particularly the English-speaking ones, requested that the translation of this article should be re-examined.

[2] For the reasoning underlying this principle, see footnote 3 of document A/C.6/53/WG.1/INF/1.

a ministry of his country, causing serious bodily injury to the members of the armed forces guarding it.

9. A strict interpretation of the proposed text leads to the logical conclusion that, since the bomb explosion took place in a situation of armed conflict, and since it injured non-civilians, the financing of the act falls outside the scope of application of the convention. Other cases of acts of violence committed outside the context of an armed conflict can be imagined.

E. The solution proposed by ICRC

10. It was, of course, not the intention of the authors of the draft to allow anyone to evade the rules of international humanitarian law and those of the draft convention under discussion here. That is why, in the opinion of ICRC, and in reply to the questions that several delegations asked it, this provision should be reworded. ICRC therefore wishes to propose, once again, the recommendation made on 26 February and 6 October 1998 during negotiations on the Convention on the Suppression of Acts of Nuclear Terrorism,[3] namely, to replace the clause referring to situations other than armed conflicts (article 2, paragraph 1 (b) of document A/AC.252/1999/WP.45) by the following text:

> "In situations of armed conflict, the parties to the conflict shall be bound by the rules of international humanitarian law, and this Convention shall therefore not apply."[4]

Such a solution has the advantage of simplicity: it makes it possible both to resolve the question of the loophole available to certain groups or individuals, and also to accommodate the proposal made by the delegation of Lebanon to which ICRC refers in section A above. The Lebanese proposal could also be accepted without change (A/AC.252/1999/WP.33).

[3] This clause in the draft convention is taken word for word from the corresponding text in the 1997 International Convention for the Suppression of Terrorist Bombings (art. 19, para. 2), the wording of which leaves much to be desired.

[4] A/C.6/53/WG.1/INF/1, ninth paragraph.

Annex

Statement made on 19 March 1999 by the observer for the International Committee of the Red Cross

Mr. Chairman, thank you for giving me the opportunity today to express the concern of the International Committee of the Red Cross (ICRC) regarding the extremely broad definition of "offence" as contained in article 2 of the draft Convention.

Indeed, as several delegations have pointed out this week, certain humanitarian activities could be considered criminal if the current text was adopted.

This is, of course, not the objective or the spirit of the draft Convention before this Committee. The ICRC delegation is perfectly aware of this. Nevertheless, as the only humanitarian organization represented here, we deem it necessary to raise briefly several concerns.

If the objective of humanitarian activities is to assist and protect the victims, recent history has shown that this task has not always been easy and that humanitarian organizations could be faced with very difficult dilemmas.

Allow me to give an example that illustrates this problem: when a small group of armed persons hides among hundreds of thousands of innocent civilians, women and children, for example in a refugee camp, it may be impossible to provide assistance to the latter without part of the assistance being diverted by those few undesirable individuals. This perverse effect, which may result from humanitarian assistance, is recognized as inevitable in such situations.

My delegation understands very well the reluctance expressed with regard to making a very broad exception for humanitarian activities. It is quite conceivable that such a clause could be misused by unscrupulous, and even criminal, organizations.

The entire difficulty here lies in the criteria for defining which organizations and which activities should be exempt from the scope of the convention. At this stage, ICRC unfortunately does not have a comprehensive answer to this thorny question.

One way of proceeding could be to examine the mandate given to the humanitarian bodies and refer to it in the convention. In situations of armed conflict, ICRC receives its mandate from international humanitarian law, namely, the Geneva Conventions and their Additional Protocols. In situations not involving armed conflict, its mandate is based on the statutes of the International Red Cross and Red Crescent Movement, which were adopted by the members of the Movement and the States parties to the Geneva Conventions.[a]

In addition to the possibility of including a clause making an exception for humanitarian activities, we believe that it would be advisable, as many delegations have pointed out, to reword the definition of "offence" in such a way as to reflect the *illegal* nature of the assistance provided, and above all the *intent* of the individual or the organization to support the commission of acts of terrorism.

[a] Adopted in Geneva in October 1986 by the twenty-fifth International Conference of the Red Cross and Red Crescent.

While it is true that the convention should make it possible to suppress voluntary acts of financing terrorism, it is also important to safeguard the mandate and activities of humanitarian organizations.

The delegation of ICRC therefore hopes that the Committee will be take its concerns into consideration.